

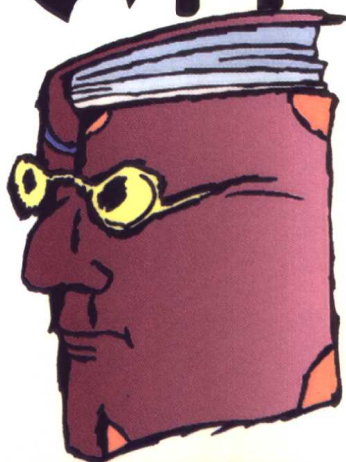
法律与英语复合人才阅读
英 汉 对 照 系 列

陈忠诚 编著

原汁原味，再现精彩英文原著； 英汉对照，方便读者阅读学习；
专家编著，提供权威翻译注释； 词汇丰富，涵盖法学重要领域。

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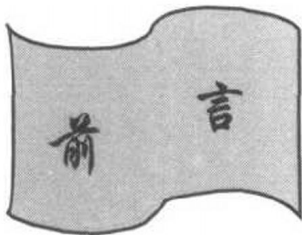
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鉴于目前适合读者学习的法律英语阅读材料较为匮乏,应法律出版社之邀,特编写此书,以满足广大读者的需要。

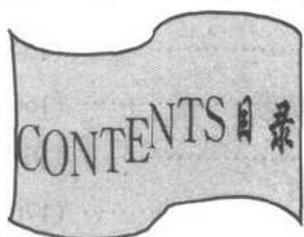
本书每篇文章主要由原文欣赏、参考译文及注释组成。与其他法律英语阅读教材相比,本书具有如下特色:(1)原汁原味。本书的文章均选自英文原著,这不仅有助于读者了解相关国家的法律规定,还能使读者在此基础上掌握比较纯正的法律英语知识。(2)采用英汉对照形式。本书采用英汉对照和篇连脚注的编排方式,更便于读者阅读、学习和查阅。(3)文章所涉内容比较全面丰富。在具体内容上包括民法总论、合同法、婚姻家庭法、知识产权法、产品责任法等;在涉及国家上,除重点介绍英美国家法律外,还适当介绍日本、拉丁美洲、突尼斯等国的法律制度。(4)文章大多短小精练,题材多样,能让读者在最小的空间内掌握尽可能多的法律英语知识。(5)编排体例灵活自由。本书在编排体例上没有严格的前后顺序,读者可根据自己的需要和喜好,自由选择阅读,无须拘泥于目录的编排顺序。

本书适合具有一定英语基础的大学师生学习使用,也可供法官、检察官、公安人员、律师、公证人员及其他法律工作者阅读,其他喜爱法律英语的读者亦可选此书作为自学之用。

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陈忠诚

2003年2月于上海



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法律英语阅读 民法



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1. *Persons*

The common law thinks only of persons (whether natural or **artificial**)¹ as **bearers**² of rights and duties. It cannot for example look upon land or an idol or an animal, viewed as such, as having rights or duties. African **customary law**³ would have no difficulty with the first concept, as Hindu law would have no difficulty with the second or Buddhist law with the third.

In cases where the conferment of such rights or the imposition of such duties is necessary, Western systems tend therefore to resort to the fiction of investing such **entity**⁴ with an artificial legal "**personality**"⁵. Once the non-human entity is thus invested with personality, there is no difficulty in speaking of it as having rights and duties. The **Privy Council**⁶ hearing an **appeal**⁷ from India, had no difficulty in doing just this in the case of a Hindu idol, which had traditionally held property in its own right in Hindu law.

The concept of artificial personality having thus been invented in Western law, it came to be applied to a variety of entities both human and non-human. For example a group of persons trading together could by the process of **incorporation**⁸ entitle themselves to a further personality in addition to the various natural personalities possessed by them in their own right. This artificial collective personality could hold property, make contracts, and sue and be sued in

1 artificial: 人授的,人为的; artificial person: 法人

2 bearer: 承受者,(票据上的)"来人"

3 customary law: 习惯法

4 entity: 实体



人

普通法只把人(无论是自然人还是法人)看成是权利和义务承受者。例如,普通法不能把土地、崇拜物或动物等,看成是享有权利或负担义务的主体。按照非洲的习惯法,土地作为权利主体或义务主体是不成问题的,正如印度教法把崇拜物、佛教法把动物当作权利主体和义务主体是没有问题的一样。

所以,遇必须授予如上权利或设定如上义务之场合,西方各国的制度往往求诸于这样一种假设:赋予这种实体以人授的法律“人格”。非人实体一旦经如此赋予人格之后,再去说它有权利和义务,那就毫无困难了。英国枢密院审理印度提出的一个上诉案件(其中涉及到一个印度偶像)时,正是毫无困难地那么做的——因为根据印度教法,印度的偶像本身,传统上就是拥有财产的。

在西方国家的法律中,法人人格这一概念就这样发明出来了。于是,它逐渐被适用于许多不同的实体——人的实体和非人的实体。例

5 personality: 人(格)

6 Privy Council: 枢密院

7 appeal: 上诉

8 incorporation: 成立公司,成立法人

every respect as if it were a natural person. Incorporation in this fashion would occur through the action of the state—a charter of incorporation from the sovereign, or incorporation under some statute such as the *Companies Acts*.⁹ Even single individuals such as an archbishop, minister, or head of a government department might be given such a status and personality over and above the personality they might enjoy as natural human beings. There would then be two legal personalities attaching to the same human being—both of which needed to be kept distinct in their dealings. The device of artificial personality has helped greatly in the development of commerce, for it became possible by this device to keep the property of participant members of a trading venture separate from that of the *trading venture*¹⁰ itself. The failure of the latter would not then involve the *bankruptcy*¹¹ of its individual members, and it became possible for these ventures to indulge in commercial operations on a considerable scale. The phenomenal success of Western commerce since the days of colonial expansion owes a great deal to this concept. The East India Company, created by royal charter, became practically a government in its own right administering territories greater in extent than Great Britain herself.

The *fiction of personality*¹² is maintained for such institutions by giving them a *corporate seal*¹³ which operates as their *signature*.¹⁴ Certain formalities need to be observed regarding the affixing of this seal. Once affixed in the manner *stipulated*¹⁵, a document is binding upon the corporation in the same manner as a person would be bound by his signed document. However, with corporations, every Act in order to be *valid*¹⁶ must be within its powers as specified in its *document of incorporation*¹⁷. Any Act travelling beyond the scope thus set for the corporation's activities would be invalid, and not binding on the corporation.

To be distinguished from groupings involving artificial personality are those which do not enjoy such a status. Unincorporated associations such as clubs and trading partnerships fall into this latter category. In general unincorporated associations

9 Companies Acts: 公司法

10 trading venture: 商业(贸易)企业

11 bankruptcy: 破产

12 fiction of personality: 人格之假设

13 corporate seal: 法人的(“公”)章

如,合在一起做买卖的一群人,能按成立法人的程序,使自己除了本来就拥有的各种自然人格之外,有权另行取得人格。这一集体的法人可拥有财产、订立契约并在各方面都可与自然人一样起诉和应诉。这种法人是借助于国家的行为——由主权者颁发设立法人之特许状或根据《公司法》之类的制定法——而设立的。甚至像主教、牧师或政府部门首脑那样的个人,亦可在其作为自然人原本可以享有的人格之外,另外具有法人的身份和人格。这样,同一个人在法律上就具有两个人格了——这两个人格在其活动中不得混为一谈。赋予法人以人格这个办法,对发展商业大有帮助。因为这样才有可能使商业企业成员的财产同该商业企业的财产保持相互独立,企业失败就不致引起企业成员破产,而这些企业也才有可能放手从事大规模的商业活动。从殖民扩张的日子以来,西方商业的巨大成功,大半得归功于这一概念。由王室特许而成立的东印度公司本身就是一个实际上的政府,它所管理的幅员,比英国本身还要大。

这些机构所具有的假设人格,是通过授予法人的印章才得以维持的,而盖印章与签字有同等效力。使用法人的印章,必须遵守一定的形式。文件一旦按规定形式盖了章,就对法人发生约束力,如同自然人须受其签字的文件约束一般。但就法人而言,其每一行为都必须在设立的文件所明文规定的权限之内,才能有效。任何行为如超越以上规定的法人活动的范围,均属无效,从而对法人无拘束力。

不享有法人身份的集团,必须同具有法人人格的集团区别开来。未设立为法人的团体,如俱乐部和从事贸易的合伙组织,均非法人。

14 signature: 签名

15 stipulate: 规定(用于合同,一般不用于法律。法律用语为“provide”或“prescribe”)

16 (in)valid: 有(无)效

17 document of incorporation: 设立法人的文件(如“memorandum of association”或“articles of incorporation”等)

cannot bring actions in their own name, but there are exceptions which it is not possible to detail here.

The “veil of corporate personality” had led to great economic and social consequences by shielding from public gaze the personalities of a corporation’s constituent members. Not all members of the public have the time to scan corporate registrations to ascertain who in fact own the governing interests in a particular corporation. Even if they did, the search grows more complex in the case of large corporate entities some of whose members may themselves be other corporations, a process that can be repeated endlessly.

We have not the space here to refer to other aspects of the concept of personality in detail, suffice it to state the seemingly obvious proposition that legal personality can obtain only between birth and death. The unborn *foetus*¹⁸, or the deceased person, cannot be recognized as a person by the law, though of course the law is aware of the need to accord to the former a protection against injury, which comes into existence as a right, upon birth. Thus, an unborn child who is injured while still in the womb can, on birth, claim for a wrongful injury to its mother which resulted in injury to itself. The Victorian case of *Watt v Rama* was an early recognition of this principle. The criminal law, likewise, makes *wilful or negligent*¹⁹ injury to an unborn foetus an offence in certain circumstances, and the law of property, likewise, gives limited recognition to the child *en ventre de sa mère*.²⁰

This opens up the controversial question of the attitude of law to abortions. There is room here for the argument that legal attitudes to the personality of the unborn child are ambivalent in that on the one hand the law is prepared to protect its personal and property interests and on the other is prepared to permit its total destruction. This ambivalence needs closer conceptual examination.

At the other end of life, we now face problems in relation to the time of death, which marks the cessation of natural personality. New scientific developments, especially in the field of organ transplants, are forcing a closer examination of the criteria of physical death. Cessation of breathing, cessation of brain

18 f(o)etus: 胎儿(请比较“embryo”)

19 wilful or negligent: 故意的(的)或过失(的)

一般说,未成立为法人的团体不得以团体的名义起诉;但也有例外,这里不能一一细说了。

“法人人格的面纱”在众目睽睽之下掩盖了法人创办人的个人人格,从而引起了巨大的经济和社会后果。公众未必人人都有时间去检索法人登记,以查明某一具体法人的主要利益归谁所有。即使有时间那样做,那么遇到大规模的法人实体,检索起来就更复杂了。因为这种巨型法人的某些成员,其本身也可以是其他法人——因此其检索过程可以漫无止境地一再重复下去。

限于篇幅,这里无法就人格概念的其他方面一一细谈,只要说一个看来似乎是很明显的命题就够了:法律上,人格仅在方生与未死之间才得到承认。尚未诞生的胎儿或已经死去的人,法律是不承认其为人的;当然,尽管需要保障胎儿使之不受伤害,法律是意识到的——这一保障是胎儿与生俱来的权利。例如,一个还在娘胎时就受了伤的子女,一问世就可因其生母非法受人伤害致使其本人也遭受伤害而提出索赔的请求。维多利亚时代的瓦特诉拉玛一案就是早年对这一原则的承认。同样,刑法也在一定情况下把故意或过失伤害胎儿规定为犯罪;财产法也同样——给予胎儿以一定的承认。

这就引起了一个有争议的、法律对堕胎的态度问题。这里,要提出下列论点是有余地的:法律对胎儿人格的种种态度自相矛盾,因为一方面法律存心保护胎儿的人身权和财产权,而另一方面法律又存心任人彻底摧毁胎儿。这一矛盾需要在概念上作进一步研究。

在生命的另一端,我们正面临着关于死亡时间的种种问题,因为死亡标志着自然人人格之终止。新的科学发展,特别是在器官移植方面的发展,迫使人们对生理死亡的各项标准作进一步研究。呼吸停

function and cessation of heart function are all possible criteria. There is a discernible movement towards the recognition of total and irreversible brain damage as marking a suitable point for the withdrawal of some legal protections of personality (as for purposes of removal of organs or withdrawal of life support systems) but the law is as yet in a formative stage in this area, in which the Australian Law Reform Commission has made one of the most significant studies.

止、脑功能停止和心脏功能停止,都是可能的标准。一种概然可见的动向,是承认完全且又不可逆转的脑坏死是标志停止对人格之某些法律保障(如摘除器官或撤去维持生命的设备)的适当时机。但在这一领域中法律尚在其形成阶段,而澳洲法律改良委员会已经在这方面进行了很有意义的研究。



2. Changing a Name

Many Americans don't realize that changing a name is so easy. Indeed, there is a common misconception that lawyers and courts must be involved in some mysterious *mumbo-jumbo*¹ in order for *the Willards and Friedas*² of this world to choose new names. But the simple fact is that changing one's name by the "Usage"³ method—using the new name exclusively—is just as legal as going to court and having a judge *rubber-stamp*⁴ the new name.

The requirements of the Usage method are:

1. That your new name be used exclusively and consistently in your daily affairs. If you use a name only in certain situations, i. e., for writing, acting, business, etc., you have not *legally*⁵ changed your name; and
2. That the new name not be used for *fraudulent*⁶ purposes, such as trying to escape payment of debts.

Usage is not the only way to change a name—it can also be accomplished by a court petition. But, if Usage name changes are just as legal, why bother with the expense, delay, and trouble of going to court to get a judge to approve the change? Because most people, including bureaucrats and administrators, both in business and in *government agencies*⁷, are ignorant (or suspicious) of the validity of the Usage

1 mumbo(-)jumbo ['mambəu'dʒʌmbəu]: 咒语

2 the Willards and Friedas: 叫 Willard 和 Frieda 的人们(相当于汉语的,比如说,“王五们”和“赵六们”)

3 “Usage”: “使用”法(即通过只使用新的姓名而变更姓名的方法)

4 rubber-stamp: (盖) 橡皮图章(办例行公事)